Hong v. *Public Prosecutor.*[2] At page 233 His Lordship says:—

"The words 'anything whatsoever' by themselves have as wide a meaning as any words can have but that meaning is governed and greatly restricted by the word 'containing'. A thing containing another thing is not synonymous with a thing in which that other thing is. To take an extreme example, it is not correct to say the earth contains the fly which at the moment is walking up the wall of my Chambers. Both by derivation and by ordinary usage the word 'containing' implies some measure of holding or restriction. The jar contains the jam but the cupboard contains the jar. In short, a container is not something in which another thing is. It is something which surrounds or holds another thing so as to prevent that other thing from being elsewhere."

That case is distinguishable from *Public Prosecutor* v. *Ong Chang Sow*[3] which a locked box containing opium was found under the bed of the Accused and the keys of which were held by another person. The box is the container and not the room. I therefore hold that in the present case the motorcar in question is not the container that contained the morphine but the two sacks which were used to keep the blocks together are the containers. The presumption therefore does not apply.

The duty of the defence is to raise a reasonable doubt on the prosecution case. As I said earlier, the prosecution case depends on the admissions by the Accused to P.W.3 as corroborated by P.W.4. This is an extra-judicial confession which I considered with caution as to the weight to be attached. It was made voluntarily by the Accused to P.W.3 who was carrying out his official duty. There is corroboration by another officer (P.W.4) of what actually transpired. I have no reason to doubt the truth of such admissions which were made by the Accused on the spur of the moment in the least expected time when caught red-handed by P.W.3 and his raiding party. (See *Sarkar* on Evidence. 12th Ed., p.230). The facts in issue clearly show the Accused did an act preparatory to or for the purpose of trafficking in morphine. He also had knowledge and was in conscious possession of the opium found on the floor of his house.

In the light of the facts and circumstances as stated above taken as a whole, I conclude that the defence has no raised any reasonable doubt to the prosecution case. I therefore find the Accused guilty on both charges and convict him.

As regards the sentence, in view of his age and that he was most probably a carrier of drugs, the sentence of life imprisonment with effect from the date of arrest is justifiable and a deterrent.

Convicted and sentenced accordingly.

Solicitors: *Karpal Singh & Co.*

MOHAMED YUSOF BIN HAJI AHMAD v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Agil Barakbah J.) November 19, 1980]

[Alor Star — Kedah Criminal Appeal No. 69 of 1979]

Dangerous Drugs — Trafficking of 2,700 gms. of cannabis — Defence of duress rejected — Sentence reduced from life imprisonment and whipping to life imprisonment only — Dangerous Drugs Ordinance 1952, ss. 37A & 39B.

Criminal Law & Procedure — Appellant accused of trafficking — Cautioned statement taken by investigating officer admissible — Threat by indirect approach — Caution becomes ineffective — Criminal Procedure Code, ss. 112 & 113 — Evidence Act 1950, ss. 3 & 24.

The appellants was found guilty of trafficking on his own behalf of dangerous drugs to wit 2,700 gms. of cannabis, an offence under section 39B(1)(a) of the Dangerous Drugs Ordinance 1952 on December 27, 1977 at the Railway Station, Perlis. He was sentenced to life imprisonment and with four strokes of the rotan. He appealed against both the conviction and sentence. The appellant contended that the learned trial President failed to scrutinize the evidence of P.W.4 the police inspector who recorded the cautioned statement from the appellant, in its proper perspective. Had he done so he would not have admitted it.

The appellant admitted that he carried the 2 bags containing cannabis but maintained that he did so under threat from a male Thai whom he met by chance in a hotel. The man threatened him with a pistol and told him to carry the two bags across the border to the railway station, Padang Besar, and if he did so the Thai promised to pay him M$400 but if he did not do so he would be shot.

Held, dismissing the appeal: (1) since proof of inducement or threat is difficult, the discretion of the court is unfettered by the concrete standard of proof necessary in other cases. The court is therefor free to scrutinize the evidence and surrounding circumstances to determine the presence or absence of any threat or inducement, its sufficiency and how it worked in the mind of the accused;

(2) the fact that P.W.4 who recorded the accused's statement was also the investigating officer by itself was insufficient to render the statement inadmissible;

(3) threat or inducement need not only be made by direct means. It is sufficient by an indirect approach eg. from the mannerism of speech or conduct of the person in authority and the present court was satisfied from the

facts and surrounding circumstances that its effect in the mind of the accused was that he had to make a statement whether he liked it or not. The cautioned statement was therefore, wrongly admitted;

(4) there was nothing to suggest that when the appellant placed the bags on the platform and went to purchase the ticket, duress was present or continued to be present;

(5) the element of truth is required but the element of probability is the main factor so that if the court accepts the defence story as probable even though it is not convinced of the truth, then the defence has succeeded in proving to the contrary the presumption that has arisen. In this case the learned President applied the correct test and concluded that the alleged threat was improbable;

(6) as regards the sentence, in view of the seriousness of the offence the imposition of life imprisonment was justified. However, in the light of extenuating circumstances which led him to commit the offence and as he was a first offender, he should be spared the rotan.

Case referred to:

(1) *Tan Seng Ann* v. *Public Prosecutor* [1949] M.L.J. 87.

CRIMINAL APPEAL.

Jag-jit Singh for the appellant.

Abdul Malik bin Haji Ishak (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The appellant was found guilty of trafficking on his own behalf of dangerous drugs to wit 2,700 grammes of cannabis, an offence under section 39B(1)(a) of the Dangerous Drugs Ordinance, 1952, on December 27, 1977 at about 1.45 p.m. at the Railway Station, Padang Besar, Perlis and was sentenced to life imprisonment and with four strokes of the rotan. He has now appealed against both the conviction and sentence.

Mr. Jag-jit Singh appeared for the appellant and D.P.P. Abdul Malik bin Haji Ishak for the respondent. There are six grounds of appeal and grounds 2, 3, 4 & 5 are dealt with together.

The first ground alleges that the learned trial President failed to scrutinize the evidence of P.W.4, the police inspector who recorded the cautioned statement from the appellant, in its proper perspective. Had he done so he would not have admitted it. In the court below, the learned President held a trial within a trial to consider the voluntariness of the cautioned statement recorded by P.W.4 from the accused. After hearing the prosecution witnesses and the accused and after listening to the submissions of the prosecuting officer and the defence counsel, he held that the statement was voluntary and admitted it as evidence (Ex. P.14). It was submitted that the inspector (P.W.4) was also the investigating officer in that case and as such it was highly undesirable for him to have recorded the statement. Secondly, after the caution was administered, P.W.4 failed to ask the accused whether he understood the caution and if so, whether he wanted to make a statement. In recording the statement P.W.4 was exercising the powers under section 113 of the Criminal Procedure Code which is *in pari materia* with section 37A of the Dangerous Drugs Ordinance, 1952. The section renders such statement admissible at the trial of an accused person notwithstanding that it is recorded in the course of police investigation or that it is made wholly or partly in answer to questions or *made to or in the hearing of any police officer of or above the rank of Inspector* or whether or not it is interpreted to him by any other police officer or other person, provided the other requirements in sub-section (1)(a)(i) & (ii) are complied with. Sub-section (1)(a)(ii) refers to the administration of the caution which in this case, appeared to have been complied with. The other sub-section refers to the duty of the trial court to determine whether the making of the statement appears to have been caused by any inducement, threat or promise having reference to the charge from a person in authority, etc. (The emphasis is mine). From the words italicised, if it is the intention of legislature to safeguard the position of the recording police inspector who is also the investigating officer in so far as the voluntariness of the cautioned statement is concerned, then the discretion of the trial court in considering the proviso (a)(i) appeared to be narrowed. It has been and is still the accepted practice of the police and a salutary one, to require their officers other than the investigating officers, to record such statements from accused persons who are in their custody. A departure from such practice seldom happens and if it does, it is mainly due to urgency and non-availability of such officers on hand.

Section 113 must be distinguished from section 112. In the latter any person examined by a police investigating officer is legally bound to state the truth and answer all questions put to him by such officer except the answers that have a tendency to expose him to a criminal charge, penalty or forfeiture (whether or not a caution under section 113(1) has been administered to him). The statement so recorded is intended to

assist the police in their investigations and form the basis for evidence to be adduced by the prosecution at the trial. Section 113, on the other hand, renders the cautioned statement admissible in evidence at the trial of the accused who may be cross-examined on it and his credit may be impeached thereon if he tenders himself as a witness.

The more important reason, I think, arises from the construction of the words in the first proviso to the section "if the making of such statement appears to the court to have been caused by any inducement, threat or promise . . . from a person in authority . . ." It is the reproduction of the provision of section 24 of the Evidence Act, 1950 which deals with confessions made by accused persons. The word "appears" indicates a lesser degree of probability than "proved" as defined in section 3. A well-grounded suspicion based on the facts and surrounding circumstances may exclude a confession. Since proof of inducement or threat is difficult and in many cases impossible of attainment at that stage, the discretion of the court is unfettered by the concrete standard of proof necessary in other cases. The court is therefore free to scrutinize the evidence and surrounding circumstances to determine the presence or absence of any threat or inducement, its sufficiency and how it worked in the mind of the accused. (See *Sarkar* on Evidence Twelfth Edition page 222). The only reason appearing on record is that although P.W.4 was the investigating officer his duty in the case was merely to record statements and to send the exhibits to the Government Chemist for the purpose of analysis. He recorded the accused's statement before recording those of other witnesses. Whilst the reason may not be justifiable, the fact that he was also the investigating officer by itself is insufficient to render the statement inadmissible. There is however, the other ground as mentioned earlier i.e. he understood the caution he had administered and if so whether the accused wished to make a statement. No doubt the words of the caution are self explanatory and can be easily understood. The accused, I agree, is no "country bumpkin" having received higher secondary education. Section 113 also does not expressly require such questions to be asked. Nevertheless it is the requirement of the first proviso that is vital here. The court has to determine by scrutiny of the evidence and the surrounding circumstances whether the statements appear to have been caused by any inducement, threat or promise . . . from a person in authority i.e. P.W.4 himself. He said he thought it was not important to ask those questions. The accused also admitted P.W.4 did not induce, threaten or make any promise to him to make a statement. However he also said P.W.4 spoke in a rough voice and looked angry because his face was red. He admitted P.W.4 administered the caution to him but ended his evidence by saying "I did not then want to give a statement". He was never challenged on that point. It seems clear that although the learned President asked him a number of questions which were recorded together with his answers, he failed to grasp the significance of the actual situation. The accused was alone with P.W.4 in the latter's room. The previous day the inspector said he attempted to record a cautioned statement from the accused but did not manage to do so. So he sent the accused back to the lock-up. When cross-examined further he said he attempted to record it earlier because he believed the truth would come out. His reason for not recording was because the accused became very sad. So he did not write anything. I cannot help noticing in court the appellant still looked very sad. On the other hand P.W.4 admitted in cross-examination that when he caused the accused to be brought to him the second time he had already made up his mind to record a statement from the accused although the accused did not say he wanted to give a statement. That to my mind tends to support the accused's evidence that P.W.4 spoke to him in an angry manner. Threat or inducement need not only be made by direct means. It is sufficient by an indirect approach e.g. from the mannerism of speech or conduct of the person in authority and the court is satisfied from the facts and surrounding circumstances that its effect in the mind of the accused is that he has to make a statement whether he likes it or not. In the circumstances the caution that is administered loses its efficacy and the whole purpose and intention of the provision is thereby defeated. The next question is whether a caution was administered by P.W.4 to the appellant before he attempted to record the first statement. In that respect P.W.4 said he attempted to do so on December 26, 1977 at 4.00 p.m. almost as soon as the accused was handed to him. He "did not manage to record accused caution statement" and did not write anything the first time. It is true that P.W.4 was not cross-examined on the point but as is normally expected a caution should have been administered before any attempt is made to record a statement and if the accused refused to do, it should be recorded in writing

because that is a clear indication that the accused has exercised the option given to him from the caution itself in not making any statement. In the result a second statement so recorded has to be viewed with great suspicion and treated with extra caution by the trial court when considering its voluntariness. It is unfortunate that the learned President has failed to consider this in his grounds.

With respect I agree with Mr. Jag-jit Singh that had he scrutinised the evidence of P.W.4 in its proper perspective, he would not have accepted the cautioned statement as being voluntary. I hold therefore that Ex. P14 is wrongly admitted.

I now come to grounds 2, 3, 4 & 5. I am satisfied that even in the absence of the cautioned statement the prosecution have proved that the two plastic bags containing cannabis were under the custody or control of the appellant. The evidence as accepted by the trial President was that on the day and time specified in the charge the appellant was seen by D/PC. 46998 (P.W.1) and three other police personnel, walking towards Padang Besar Railway Station from the direction of Pekan Siam carrying the two plastic bags in his right hand. When he came near P.W.1 stopped him identified himself and seized the two bags. From the bags they recovered 4 newspaper packets containing dried leaves suspected to be cannabis. P.W. 1 arrested the appellant and lodged a report. Subsequently the exhibits were sent to the Government Chemist who confirmed that they were 2,700 grammes of cannabis, a dangerous drug defined in section 2 of the Ordinance. The learned President rightly concluded at the close of the prosecution case that the presumption under section 37(d) came into operation. As a result the appellant was deemed to be in possession and knowledge of the said drugs. Since there is direct prosecution evidence of the carrying of the drugs by the appellant falling under the definition of trafficking in section 2 of the Ordinance, there is no need to invoke the presumption under section 37(da). The onus is therefore on the appellant to prove the contrary.

In his defence the appellant admitted that he carried the two bags containing cannabis but maintained that he did so under threat from a male Thai, a Malaysian Citizen named Peri bin Safar, whom he met by chance in a hotel in Sadau. The man threatened him with a pistol and told him to carry the two bags across the border to the railway station, Padang Besar and if he did so the Thai promised to pay him M$400/– but if he did not do so he would be shot. He was also warned not to go through the customs check point otherwise he would be shot. From Sadau the man gave him a lift on his motorcycle to Pekan Siam and from there he walked across the border and the railway lines to the railway station carrying the bags. The man he said followed him on foot up to the railway station and was about 20 feet or so away when he was arrested by the police. In his grounds of judgment the learned President discussed the provisions of section 94 of the Penal Code quite in detail and concluded that the appellant had failed to bring himself under the protection of that section thereby failing to rebut the presumptions operating against him. He found the appellant guilty as charged. Section 94 states:

> "94. Except murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence. Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.
>
> Explanation 1 – A person who, of his own accord, or by reason of a threat of being beaten, joins gang-robbers knowing their character, is not entitled to the benefit of this exception on the ground of his having been compelled by his associates to do anything that is an offence by law.
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> Explanation 2 – A person seized by gang-robbers, and forced by threat of instant death to do a thing which is an offence by law – for example, a smith compelled to take his tools and to force the door of a house for the gang-robbers to enter and plunder it – is entitled to the benefit of this exception."

Under this section there must be reasonable fear, at the very time, of instant death. Persons who do criminal acts from fear of anything but instant death do them at their peril. If an offence is completed when all danger of instant death has been removed the person committing the offence is not protected under this section. Further if the accused on his own accord places himself in a situation by which he became subject to the threats of another person, whatever threats may have been used towards him, the provisions of this section do not apply.

In *Tan Seng Ann* v. *Public Prosecutor*[1] Willan, C.J. delivering the judgment in the Court of Appeal in Kuala Lumpur held that duress in order to be pleaded successfully must be im-

minent, extreme and persistent. The facts in that case were that the appellant and 4 other Chinese were stopped while travelling in a motorcar and detained. As a result of the finding of a house key on his person, the appellant led the police to his house, unlocked the door with the key and pointed to the police inspector a revolver which was lying concealed in a cupboard. At the trial he made a statement from the dock stating that two men brought a small parcel requesting him to keep it in the house for the night. On being told that it contained a revolver he objected and requested them to take it away to avoid any trouble with the authorities. In spite of his non-co-operation they left the parcel in his house, took him in the car to Selayang where they were stopped by the police and arrested. The Court of Appeal in supporting the conviction concluded that there was nothing on the record in that case to suggest that duress was present or continued when the appellant went out in the car with the other Chinese.

Applying the principle stated above it is apparent that the illustration at Explanation 2 of section 94, the threat of instant death to the smith who was forced to open the door of the house for the gang-robbers to enter and plunder it, is imminent, extreme and persistent as to entitle him to the benefit of the exception even though he had committed an offence under the law which is not punishable with death. In the presence of the robbers it was reasonable for him to have the apprehension of being killed instantly if he refused to carry out their threat. With respect I do not agree with the trial President that since the accused mentioned about being shot rather than being killed there was no threat of instant death. A pistol shot at or near the vital part of the body normally results in instant death. Each case of course depends on the facts and surrounding circumstances. In the present case apart from being threatened by the Thai of being shot the man also followed him on foot by keeping a distance of about 20 feet or so away. However, from the appellant's own version he had complied with the request to carry the two bags to the railway station and had successfully alluded the customs check point. He had reached the station, placed the bags on the platform and had gone to purchase a ticket all indicating that he was leaving Padang Besar. He had been carrying the drug for about one and half hours and had made no attempt to approach any member of the public or police authorities for help. In short he had already completed his mission except for the handing over the drugs to the Thai who was according to him also at the station platform and collect the $400/- from him. In the circumstances it is my considered judgment that there is nothing to suggest that when the appellant placed the bags on the platform and went to purchase the ticket, such duress was present or continued to be present.

Secondly, although according to the appellant the Thai was about 20 ft. away on the platform when he last saw him, the presence of some people there, not to mention the four police personnel (then not known to the appellant), considered with the facts stated above, rendered the duress no longer imminent, extreme or persistent. I find that there are no merits in this appeal and accordingly dismiss it.

The learned President's ground when considering the defence was also criticised when he said that without considering the truth of the defence he was compelled to the conclusion that the appellant conclusively placed himself out of the ambit of section 94. He was applying the test which requires the defence to prove their case on the balance of probabilities i.e. whether it was likely in the circumstances to accept that the defence story exists. The element of truth is of course required but the element of probabilities is the main factor so that if the court accepts the defence story as probable even though it is not convinced of the truth, then the defence has succeeded in proving to the contrary the presumption that has arisen. In this case the learned President in applying the correct test concluded that the alleged threat was improbable. If at all he has not considered the element of truth, for the reasons stated earlier I do not think it has resulted in miscarriage of justice.

As regards the sentence, in view of the seriousness of the offence the imposition of life imprisonment is therefore justified. However in the light of the extenuating circumstances which led him to commit the offence, he should be spared the rotan. He is a first of offender.

I therefore confirm the conviction and sentence to life imprisonment but squash the sentence of whipping. The sentence of imprisonment is to commence from the date of arrest.

Conviction affirmed;
Sentence to life imprisonment affirmed;
Sentence of whipping quashed.

Solicitors: *Jag-jit Singh & Co.*